

3359

No. 20,220

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GERARD JOSEPH LAVOIE,	}	<i>Petitioner,</i>
vs.		
UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,		
<i>Respondent.</i>		

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

JURISDICTION

The jurisdiction of this Court is properly invoked under 8 USC 1105(a) (Section 106 of the Immigration and Nationality Act) to review the final order of deportation of petitioner.

STATEMENT OF THE CASE

Petitioner was served with an order to show cause (R., p. 185) on or about January 18, 1962, which alleged that he was a sexual deviate at the time of his entries on January 26, 1960 and May 5, 1960, and charged that he was subject to deportation pursuant

to §241(a)(1) of the Immigration and Nationality Act in that "at the time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, alien afflicted with psychopathic personality under Section 212(a)(4) of the Act."

Petitioner is a native and citizen of Canada, age 39 in 1964. He entered the United States for permanent residence at Noyes, Minnesota, on January 26, 1960 (R., p. 96). Exhibit 2, (R., pp. 187-195) is a statement taken from the petitioner by an investigator of respondent on August 30, 1961. The essential facts are recited in the decision of the Special Inquiry Officer of January 30, 1964 (R., pp. 96-99).

A letter from Dr. Daniel Beittel, M.D., a staff psychiatrist for the United States Public Health Service, was introduced into the record as Exhibit 3 (R., p. 196). Dr. Beittel was cross examined at length (R., pp. 112-148).

Dr. Bernard L. Diamond, M.D., a psychiatrist and psychoanalyst, was called by the petitioner and was examined and cross examined at length (R., pp. 154-183).

In his decision, the Special Inquiry Officer (R., p. 100) found that petitioner had not disputed the accuracy of the statements made in Exhibit 2 (R., p. 187), and that a person who has engaged in such acts twelve to twenty-four times a year over a period of at least eleven years is a sexual deviate and within the definition Congress intended to apply to the term

“psychopathic personality.” He found petitioner to have been a sexual deviate at the time of his entry on January 26, 1960 and deportable on the charge in the order to show cause.

Petitioner appealed from the decision of the Special Inquiry Officer, and on May 6, 1964 the Board of Immigration Appeals ordered the case remanded “to have included in the record the pertinent Section of the USPHS Manual for the Medical Examination of Aliens and for characterization of the respondent’s disorder by both psychiatrists in the light thereof. Further testimony should be taken as to what pattern determines a sexual deviate or homosexual.”

At the reopened hearing Dr. Beittel was recalled as a witness. Dr. Diamond was not recalled by petitioner.

The Special Inquiry Officer, on March 11, 1965, found that petitioner “having engaged in homosexual acts over an extended period of time, is a homosexual and as such is a sexual deviate and deportable as a member of the class of aliens afflicted with psychopathic personality at the time of entry”, (R., p. 19) and again ordered his deportation. The decision of the Special Inquiry Officer (R., p. 16) is attached hereto as Appendix I.

This decision was appealed to the Board of Immigration Appeals. On May 28, 1965 the appeal was ordered dismissed. The opinion of the Board of Immigration Appeals (R., p. 2) is attached hereto as Appendix II.

STATUTES*Section 241(a)(1):*

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

Section 212(a)(4):

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States: * * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect.

Section 212(a)(4), as amended by P. L. 89-236 (Section 15(b)):

(4) Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect.

PETITIONER'S SPECIFICATION OF ERRORS

1. The order of deportation is invalid as not based upon reasonable, substantial and probative evidence.
2. The statute is void for vagueness—*Fleuti v. Rosenberg*, 302 F.2d 652.
3. The order is invalid because of lack of due process in that petitioner was not advised of his right

to counsel at the time the statement was taken from him—

Massiah v. United States, 377 U.S. 201 ;

Escobedo v. Illinois, 378 U.S. 478.

SUMMARY OF ARGUMENT

1. There was no disagreement between the two psychiatrists that petitioner was a sexual deviate on January 26, 1960. Under the Public Health Service Manual for Medical Examination of Aliens, “(a) the legal term ‘psychopathic personality’ is equivalent to the medical designation ‘personality disorder’ * * * (b) Under this legal category will be classified those applicants who are diagnosed as sexual deviates.

The finding of excludability is on the ground that at the time of entry petitioner was a sexual deviate and therefore excludable as a “psychopathic personality”. This finding is not based in part on post-entry behavior.

The order is supported by reasonable, substantial and probative evidence.

2. The legislative history is clear that Congress intended Section 212(a)(4) to apply to sexual deviates. Section 212(a)(4) was amended by Public Law 89-236, October 3, 1965, by deleting the word “epilepsy” and substituting the words “or sexual deviation.”

3. The constitutional requirement of fair warning applies only to statutes regulating conduct or impos-

ing sanctions upon conduct. It does not apply to a statute such as Section 212(a)(4) of the Immigration and Nationality Act, which merely describes standards for admission of aliens.

4. Petitioner was accorded due process. The *Escobedo* and *Massiah* cases govern criminal prosecution. Deportation proceedings are civil in nature.

Fuentes-Torres v. INS, 344 F.2d 911 (C.A. 9, 1965);

Ben Huie v. INS, 349 F.2d 1014 (C.A. 9, 1965).

ARGUMENT

I. THE ORDER OF DEPORTATION IS BASED UPON REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE.

The circumstance which precipitated the order to show cause in this case occurred in the public toilet at Woolworth's (R., p. 163.) Petitioner was apprehended by a policeman on June 2, 1961 and charged with violation of Section 215 of the San Francisco Municipal Police Code (being a party to a lewd, obscene and indecent act (R., p. 108). A plea of guilty was entered and he was sentenced to a fine of \$105 or five days in the county jail (Exhibit No. 5, R., p. 60). On August 30, 1961 the statement (Exhibit No. 2, R., p. 187) was made.

In this statement petitioner freely admitted he was a "homosexual" (R., p. 189), and expressed his interpretation of the term as "a homosexual is a person whose sexual urges are directed to members of their own sex." He stated, "I first discovered this sexual urge present in me during the last year I was in the

Navy, approximately 1948." He stated that he had his first homosexual experience at the end of 1946 (R., p. 190). Thereafter he had further "experiences" (1946 and 1948). "I had no more than a dozen experiences at the most." "After 1948 these experiences occurred approximately once or twice a month." "In the last two years I have had approximately five or six homosexual experiences." While he was in the Navy, he says he engaged in hetero-sexual experiences, and his last relationship with a female was "approximately three years ago."

Petitioner's argument is that the evidence does not at all establish that petitioner is "indeed a homosexual." Dr. Beittel is quoted (R., p. 117), in response to the question:

"In other words, as you sit there now you wouldn't positively state that Mr. Lavoie is a homosexual?

A. No, I wouldn't."

But in the Record, page 120:

"Q. * * * Your attitude toward Mr. Lavoie at the present time, you wouldn't want to positively state that he either is or is not—either, one, a homosexual, or two, a sexual deviate?

A. No, you don't understand me.

Q. You feel——

A. I feel that he is a sexual deviate.

Q. You feel that he is a sexual deviate?

A. Yes.

Q. But do you feel that to the exclusion of any aspect of homosexuality?

A. Homosexuality is one of the sexual deviations."

Dr. Beittel was unequivocal that petitioner is a sexual deviate. Dr. Diamond agreed that petitioner had deviated sexually. (R., p. 172.) The Special Inquiry Officer, after referring to the Board of Immigration Appeals decision in *Matter of S*—, 8 I & N Dec.409, wherein it indicated that in determining whether a person was within the class of homosexuals, the term could be applied as it is commonly understood, then found: "I find, in the instant case, that the respondent having engaged in homosexual acts over an extended period of time, is a homosexual. As such, he is a sexual deviate and deportable as a member of the class of aliens afflicted with psychopathic personality at the time of entry." (R., p. 19.)

From the record, the term "‘psychopathic personality’ has no precise medical meaning", according to the psychiatrists. (R., p. 34.) Reference to Dr. Cleckley's book "The Mask of Sanity," mentioned by petitioner's attorney (R., p. 118) discloses the following on page 28:

"In a revision of the psychiatric nomenclature (1952) the term *psychopathic personality* was officially replaced by *sociopathic personality*. Since then the informal term, *sociopath*, has often been used along with the older and more familiar psychopath to designate a large group of seriously disabled people, listed with other dissimilar groups under the heading *personality disorder*. In this book I will use the older term *psychopath* and the newer and less familiar term *sociopath* interchangeably and to indicate the same disorder."

The Board of Immigration Appeals in its order of May 6, 1964 (R., p. 63) remanded the case in order to have included in the record the pertinent section of the United States Public Health Service Manual for the Medical Examination of Aliens and for characterization of petitioner's disorder by both psychiatrists (R., p. 68).

The pertinent portion of the Manual is on page 6-5 (R., p. 24), and is quoted as follows:

“Psychopathic personality a. The legal term ‘psychopathic personality,’ is equivalent to the medical designation ‘personality disorder’ which may be broadly defined as follows: ‘These disorders are characterized by developmental defects or pathological trends in the personality structure, with minimal subjective anxiety and little or no distress. In most instances, the disorder is manifested by a life-long pattern of action or behavior (acting out) rather than by mental or emotional symptoms.’ An example of such a certificate is Class A, Psychopathic personality, Inadequate personality. b. Under this legal category will be classified those applicants who are diagnosed as sexual deviates . . .”

All that is necessary for a certification of psychopathic personality is a finding of homosexuality or sexual deviation. As the Court of Appeals for the Fifth Circuit pointed out in *Quiroz v. Neelly*, 291 F.2d 906, on page 907:

“Whatever the phrase ‘psychopathic personality’ may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here.”

The record adequately supports the order of deportation.

II. RESPONDENT IS AN ACKNOWLEDGED MEMBER OF A CLASS OF ALIENS (SEXUAL DEVIATE) WHOM CONGRESS INTENDED TO EXCLUDE FROM THIS COUNTRY BY SECTION 212(a)(4) AS SHOWN BY THE LEGISLATIVE HISTORY OF THAT SECTION.

“That Congress intended the term ‘[a]liens afflicted with psychopathic personality,’ as used in Section 212(a)(4) of the 1952 Immigration and Nationality Act, to include homosexuals and other types of sexual deviates is conclusively demonstrated by the legislative history of the section.

“The pertinent history here reviewed is also cited in Judge Frank’s concurring opinion in *United States v. Flores-Rodriguez*, 237 F.2d 405, 412-413, n. 2 (C.A. 2), as well as in *Matter of P—*, 7 I & N Dec. 258, 261-264 (1956). In view of the unambiguous legislative history, the courts which have considered the question have had no difficulty in concluding that aliens ‘afflicted with psychopathic personality’, as the term is used in Section 212(a)(4), includes aliens who are homosexuals. See *Quiroz v. Neelly*, 291 F.2d 906 (C.A. 5); *United States v. Flores-Rodriguez*, 237 F.2d 405, 412-416 (C.A. 2) (concurring opinion); *Gandure y Marino v. Murff*, 183 F.Supp. 565 (S.D.N.Y.), affirmed *sub nom. Gandure y Marino v. Esperdy*, 278 F.2d 330 (C.A. 2), certiorari denied, 364 U.S. 824.”

The term first appeared in the immigration laws in the 1952 Act. Under prior law, the corresponding term,

describing a class of aliens excludable because of a psychopathic disorder, had been "persons of constitutional psychopathic inferiority" (Act of February 5, 1917, §3, 39 Stat. 875, as amended, 8 U.S.C. (1946 ed.) 136(a)). In addition, persons who were found to be, and certified as, "mentally * * * defective" were excludable under then existing law (*id.*, 8 U.S.C. (1946 ed.) 136(d)). In 1950, a subcommittee of the Senate Committee on the Judiciary, in a comprehensive study of the immigration laws, reported:

"The present clauses excluding mentally and physical defective aliens, with three exceptions, are sufficiently broad to provide adequate protection to the population of the United States, without being unduly harsh or restrictive. The subcommittee believes, however, that the purpose of the provision against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality', and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts. * * *"[S. Rep. 1515, 81st Cong., 2d sess., *The Immigration and Naturalizations Systems of the United States*, Report of the Committee on the Judiciary Pursuant to S. Res. 137, 80th Cong., 1st sess., as amended (*A Resolution to Make an Investigation of the Immigration System*), April 20, 1950, p. 345.]

(PP) As a result of this study, S. 3455, 81st Cong., 2d sess., was introduced in the Senate on April 20, 1950. Section 212(a) of the bill provided in pertinent part:

Sec. 212. (a) The following classes of aliens shall be excluded from admission into the United States:

(1) Aliens who are idiots, imbeciles, feeble-minded, epileptics, or insane;

* * * * *

(3) Aliens afflicted with psychopathic personality;

* * * * *

(7) Aliens who are homosexuals or sex perverts;

(8) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a mental defect * * *.

S. 716, 82d Cong., 1st sess., a revised version of S. 3455, introduced on January 29, 1951, was identical with the earlier bill in relevant part. However, when S. 2550, 82d Cong., 2d sess., a further modification of the predecessor bills, was introduced on January 29, 1952, the above-quoted subsection had been dropped and Section 212(a), phrased as it was later enacted into law, provided, in pertinent part, as follows:

Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(1) Aliens who are feeble-minded;

(2) Aliens who are insane;

* * * * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;

* * * * *

In explanation of the omission of the category ‘[a]liens who are homosexuals or sex perverts’, which had appeared in the predecessor bills, the committee report accompanying S. 2550 stated (S. Rep. 1137, 82d Cong., 2d sess., p. 9):

Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.* [Emphasis added.]

The advice of the Public Health Service mentioned in this Report appears in H. Rep. 1365, 82d Cong., 2d sess., accompanying H.R. 5678 (the bill which was eventually enacted). The Service was commenting on the ‘medical aspects’ of H.R. 2379, 82d Cong., 1st sess., a predecessor bill and companion to S. 716. Like S. 716, H.R. 2379 included as separate excludable categories, ‘[a]liens afflicted with psychopathic personality,’ ‘[a]liens who are homosexuals or sex perverts,’ and aliens not within either of those classes (or other class specified in the bill) who were certified by the examining physician as having ‘a mental defect.’ The Public Health Service recommended that

‘[a]liens who are homosexuals or sex perverts’ be eliminated as a separate category, and that the language of the bill be changed to read, in pertinent part, ‘[a]liens afflicted with psychopathic personality * * * or a mental defect’—the phraseology ultimately enacted (H. Rep. 1365, 82d Cong., 2d sess., p. 46). The Service indicated in an accompanying explanatory comment its belief that the suggested language would encompass the objective of the bill as reflected in the three separate categories referred to above, and its understanding that homosexuality and sex perversion, where clearly manifested, are ordinarily to be considered as types of psychopathic personality (*id.*, p. 47).

The relevant portion of the Public Health Service report are set forth in Appendix III.

The House Judiciary Committee, in reporting out H.R. 5678 (in the form in which it was enacted into law, so far as is relevant), indicated that it had followed the Public Health Service’s recommendations (*id.*, p. 48).

It thus conclusively appears from the legislative history of the 1952 Act that Congress intended the phrase ‘[a]liens afflicted with psychopathic personality’ in Section 212(a)(4) to include within its scope homosexuals and other sexual deviates. And since respondent, as we have seen, is admittedly a sexual deviate and homosexual, and was such at entry, it follows that he is a member of a class of aliens whom Congress decided to exclude.

III. THE STATUTE UPON THE BASIS OF WHICH THE PETITIONER WAS ORDERED DEPORTED IS NOT VOID FOR VAGUENESS, EITHER ON ITS FACE OR AS APPLIED TO THE PETITIONER.

The petitioner relies on the opinion of this Court in *Fleuti v. Rosenberg*, supra, although the Supreme Court on the application of the Solicitor General granted certiorari in this case; the judgment of this Court declaring the order of deportation of *Fleuti* void was affirmed, but on grounds other than those upon which the petition for certiorari was made.

- A. The constitutional requirement of fair warning applies to statutes regulating conduct or imposing sanctions upon conduct, but does not apply to a statute, such as Section 212(a)(4), which merely prescribes standards for the admission of aliens.

The requirement that a statute be clear and definite is based upon two fundamental considerations: (1) Statutes guide courts and administrative tribunals in the adjudication of various rights, duties and liabilities; (2) they may also serve as guides to the individuals subject to them in planning their future conduct.

1. As guides to adjudication, statutes must be sufficiently definite to provide judges, juries and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly and consistently in accordance with the legislative intent. *United States v. Petrillo*, 332 U.S. 1, 7; *Minnesota v. Probate Court*, 303 U.S. 270; *Mahler v. Eby*, 264 U.S. 32, 40-41. A deportation statute, like any other, can

be challenged on the ground that it provides neither the administrative authorities nor the courts with any reliable basis for determining what classes of aliens are deportable and thus improperly leaves the selection of deportable aliens to the caprice of administrative officials. But such a challenge cannot be made in reliance on the face of the statute alone. It is the courts' function to construe the statute to ascertain what the legislature intended by the words it used; in determining the legislative intent the courts may consider any relevant evidence, including the legislative history of the provisions in question. Thus, the courts, in construing the coverage of the federal laws relating to exclusion and deportation, have frequently consulted the legislative history, historical background and similar materials for the purpose of ascertaining more precisely the types of persons Congress intended to encompass within a specified excludable or deportable class. *Rowoldt v. Perfetto*, 355 U.S. 115, 120; *Galvan v. Press*, 347 U.S. 522, 526-528; *Knauff v. Shaughnessy*, 338 U.S. 537, 545-547, *Holy Trinity Church v. United States*, 143 U.S. 457, 463-465.

As we have shown, the legislative history of the statutory provision in question shows beyond a doubt that the Congress intended to exclude persons afflicted with the psychophysiological disorder with which the petitioner is afflicted—sexual deviation. The primary function of the requirement of definiteness—the facilitation of adjudication—is thus fulfilled in this case. The differences of opinion among psychiatrists as to the precise meaning and scope of the term “psy-

chopathic personality” are not material. Reference is again made to the citation above of *Quiroz v. Neelly*, and the Court’s observation:

“Whatever the phrase ‘psychopathic personality’ may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here.”

It is not necessary for the purposes of this case to delineate the full scope of the phrase “afflicted with psychopathic personality” as used in Section 212(a) (4). It is enough that the legislative history establishes that Congress intended it to cover persons with the particular disorder—sexual deviation—with which respondent is afflicted. That there may be doubt as to the applicability of the term to persons with other types of psychophysical defects or disorders is not a reason for failing to apply it here.

2. Although statutes must guide adjudication, some must serve in addition to give guidance to individuals with respect to their future conduct. Many statutes require the performance or avoidance of specified acts. Elementary fairness requires that such acts be described in the statute with sufficient precision to give the individual adequate notice of what conduct he must either perform or avoid. It is with respect to this function of statutes that the void-for-vagueness principle had its origin and with which it has been most often concerned. *United States v. Harriss*, 347 U.S. 612; *Jordan v. De George*, 341 U.S. 223, 232.

The rule that a person is entitled to know before he acts just what conduct the law forbids or requires has no application, however, to the present case. Here the statutory ground for expulsion is not the alien's conduct after entry, but *his condition at the time of entry*. Congress has plenary authority to make rules and regulations for the admission of aliens, and to establish categories of aliens who shall be excluded or deported, either absolutely or on such conditions as it may prescribe. *The Chinese Exclusion Case*, 130 U.S. 581; *Fong Yue Ting v. United States*, 149 U.S. 698; *Knauff v. Shaughnessy*, *supra*; *Carlson v. Landon*, 342 U.S. 524; *Harisiades v. Shaughnessy*, 342 U.S. 580. This authority includes without question the power to exclude aliens applying for admission whom Congress deems undesirable because of some mental or physical condition, and to direct their deportation if their inadmissibility is discovered only after entry has been effected. Section 212(a) is in large measure a catalog of such disqualifying conditions. These provisions of the statute are in no sense guides to conduct, and the application to them of the principle requiring definiteness in behavior-governing statutes can have no rational justification. The deportation provision of Section 241(a)(1), geared to inadmissibility under Section 212(a)(4), requires the determination of only one question: What was the alien's condition at the time of entry? If it is found, by the requisite evidence, that the alien was then afflicted with psychopathic personality, in the sense that Congress used the term, deportability is established.

The void-for-vagueness doctrine is a canon of fairness designed to insure that no person shall incur a sanction, civil or criminal, for failure to conform his conduct to a statutory rule of action seeking to regulate his future behavior, unless the command of the statute is sufficiently clear that persons of normal intelligence will know what conduct is forbidden and what allowed. It is not a device to enable persons having different characteristics, physical or psychological, or suffering from specified physical or mental disorders or defects to conduct themselves so as to avoid making these conditions manifest.

B. There is no constitutional requirement that Congress, which may enact grounds of deportation retroactively, must make grounds of deportation clear on their face.

Even if the petitioner had been ordered deported because of his post-entry conduct, and not, as is plainly clear, because of his excludable status at the time of entry, he could not object to the lack of clarity of the deportation statute on its face.

An alien whom the Government seeks to deport is of course entitled as a matter of procedure due process, to notice of the charges he must face at the deportation hearing, but it does not follow that before he can become liable to deportation Congress must first warn him of the classes which are deportable, so that he may guide himself accordingly. The Supreme Court and this Court have repeatedly held that Congress may enact grounds of deportation retroactively, and thereby render an alien deportable for past con-

duct which did not entail deportability when it occurred.

Harisiades v. Shaughnessy, supra;

Galvan v. Press, supra;

Marcello v. Bonds, 349 U.S. 302;

Fuentes-Torres v. INS, supra.

Under these decisions it is, we believe, settled that Congress could pass a statute retroactively making the term "homosexual conduct" within the United States grounds for deportation. As mentioned above, Congress on October 31, 1965, P.L. 89-236, Section 15(b), amended Section 212(a)(4), (8 USC 1182(a)(4)), by deleting the word "epilepsy", and substituting the words "or sexual deviation."

- C. Section 212(a)(4) interpreted in the light of its legislative history provided adequate notice that an alien who is homosexual, a sexual deviate, is not admissible to the United States, and may be deported if erroneously admitted.

Finally, even if the constitutional requirement of fair warning were not wholly inapplicable to a deportation proceeding, turning on whether the alien was properly admitted to the United States, this requirement would plainly be far less stringent in a case such as this than where the statute is required to give notice of criminal sanctions. Thus the type of notice constitutionally required prior to deportation of an alien such as petitioner would have to be determined in light of the following: petitioner is being deported because he was improperly admitted, and not on the basis of his conduct in the United States; he was entitled to no warning of the requisite standards for

admission; Congress may retroactively and thus entirely without warning make even post-entry conduct grounds for revocation of its permission for the alien to remain in the United States.

It is submitted that there can be no constitutional requirement that Section 212(a)(4) be plain on its face, without recourse to its legislative history.

IV. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW.

Petitioner argues that the doctrine of *Massiah v. United States*, supra, and *Escobedo v. Illinois*, supra, apply in deportation proceedings. These cases govern criminal prosecution. Deportation is not a criminal proceeding. It is a civil proceeding.

McLeod v. INS, 327 F.2d 453 (1964);

Fuentes-Torres v. INS (1965), supra;

Ben Huie v. INS, C.A. 9, August 18, 1965, supra.

There is nothing in the record indicating the statements of petitioner were induced by coercion, duress, or other improper action on the part of respondent.

Petitioner on page 18 of his brief cites the Second Circuit decision of *Sherman v. Immigration and Naturalization Service*, 34 U.S.L. Week 2169-2170, September 22, 1965. On January 26, 1966, after rehearing *en banc*, the Court denied the petition of Joseph Sherman to review the order of the Immigration and Naturalization Service, for the reasons stated in Judge Friendly's dissenting opinion, 350 F.2d at 900.

Judges Waterman and Smith dissented and voted to grant the petition and set aside the deportation order for the reasons stated in Judge Waterman's opinion, 350 F.2d 894.

CONCLUSION

It is respectfully submitted that the final order of deportation should be affirmed.

Dated, January 28, 1966.

Respectfully submitted,

CECIL F. POOLE,

United States Attorney,

By CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Respondent.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Respondent.

(Appendices Follow)

Appendices.

Appendix I

United States Department of Justice
Immigration and Naturalization Service

File: A10 767 234
San Francisco, California, March 11, 1965

In The Matter of
Gerard Joseph Lavoie,
Respondent.

In Deportation
Proceedings

Charge:

Section 241(a)(1) of the I & N Act—excludable
at time of entry under Section 212(a)(4) as one
afflicted with psychopathic personality

Application: Termination of the proceedings

In Behalf of Respondent: In Behalf of the Service:

George R. Andersen, Esq. Stephen K. Suffin, Esq.
240 Montgomery Street, Trial Attorney,
San Francisco, California San Francisco, California

DECISION OF THE SPECIAL INQUIRY OFFICER

On January 30, 1964 I entered a decision ordering
that the respondent be deported from the United
States on the charge set forth in the Order to Show
Cause. Two doctors had appeared before me and testi-
fied; one Dr. Daniel Beittel, a staff psychiatrist of the
United States Public Health Service, who had

executed a medical certificate certifying that the respondent was afflicted with psychopathic personality at the time of his entry, was produced for cross-examination at the request of the respondent; the other, Dr. Bernard Diamond, was called as a witness by the respondent. Both agreed that the respondent was not a homosexual, but was a sexual deviate. However, Dr. Beittel was of the opinion that the respondent's condition was the result of a personality disorder; Dr. Diamond diagnosed the respondent's condition as a neurotic reaction symptomized by his homosexual acts.

In my decision I referred to the fact that the testimony of the expert witnesses as to the cause of the respondent's condition was irrelevant to the question of his deportability because, as pointed out by the Court in *Quiroz v. Neelly*, 291 F.2d 906, "Whatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts." I went on to say that a person who had engaged in homosexual acts twelve to twenty-four times a year for a period of at least eleven years, was a sexual deviate irrespective of the mental condition which caused them and was within the definition Congress intended to apply to the term "psychopathic personality."

The respondent appealed from my decision, and on May 6, 1964 the Board of Immigration Appeals ordered that the case be remanded "to have included in the record the pertinent section of the United States Public Health Service Manual for the Medical

Examination of Aliens and for characterization of the respondent's disorder by both psychiatrists in the light thereof. Further testimony should be taken as to what pattern determines a sexual deviate or homosexual."

At the reopened hearing Dr. Beittel was recalled as a witness. He reaffirmed his position that within the meaning of the pertinent section of the Manual for Medical Examination of Aliens¹ the respondent was afflicted with psychopathic personality. Dr. Diamond was not recalled by the respondent presumably because of the "weighty" expense involved.

After review of the entire testimony of Doctors Beittel and Diamond I can understand the stricture in the opinion of Judge Frank in *U.S. v. Flores-Rodriguez*, 237, F.2d 405, a case involving the same condition present here, about needlessly embarking "without a pilot, rudder, compass or radar on an amateur's voyage on the fog-enshrouded sea of psychiatry." Although a good deal of their testimony only served to confuse me, I did get out of it that they agreed that the phrase "psychopathic personality"

¹The pertinent Section of the Manual for Medical Examination of Aliens reads as follows: "(a) The legal term 'psychopathic personality' is equivalent to the medical designation 'personality disorder.' which may be broadly defined as follows: 'These disorders are characterized by developmental defects or pathological trends in the personality structure, with minimal subjective anxiety and little or not distress. In most instances, the disorder is manifested by a lifelong pattern of action or behavior (acting out), rather than by mental or emotional symptoms.' An example of such a certificate is Class A, Psychopathic personality, Inadequate personality."

"(b) Under this legal category will be classified those applicants who are diagnosed as sexual deviates."

has no precise medical meaning and that "homosexual" is not a medical term.

The Manual for Medical Examination of Aliens refers to "psychopathic personality" as a legal term. Whether a person is so afflicted is a legal issue. If, as testified to by the medical experts "psychopathic personality" and "homosexual" are not medical terms, any testimony concerning such conditions is without the scope of their special competence and is of little value in resolving the issue.

Actually, as indicated by *Quiroz v. Neely*, supra, "psychopathic personality" have become words of art which, whatever else they might mean, include homosexuals and sex perverts. A practical approach to determining whether a person was afflicted with "psychopathic personality" was employed by the Board of Immigration Appeals in *Matter of S—*, 8 I. & N. Dec. 409. In that case there was also a great deal of medical testimony as to whether the alien, who had engaged in repeated homosexual acts over a period of four years, was, in fact, a homosexual. The Board, in effect, disregarded all of the experts' testimony. It indicated on page 415 that in determining whether a person was within the class of homosexuals, the term should be applied as it is commonly understood.² It pointed out that the alien in that case had engaged in homosexual acts on many occasions over some years and then went on to say, "If this man is

²In *Matter of P—*, 7 I. & N. Dec. 258, the Board defined homosexuality "as a perversion characterized by the desire for sexual relations with members of the same sex."

not a homosexual, we would find it difficult to hold that anyone is a homosexual." It concluded that he was afflicted with "psychopathic personality."

I find, in the instant case, that the respondent having engaged in homosexual acts over an extended period of time, is a homosexual. As such, he is a sexual deviate and deportable as a member of the class of aliens afflicted with psychopathic personality at the time of entry. His deportation will again be ordered.

It is Ordered that the respondent be deported from the United States to Canada on the charge set forth in the Order to Show Cause.

/s/ Chester Sipkin,
Chester Sipkin,
Special Inquiry Officer.

Appendix II

United States Department of Justice
Board of Immigration Appeals

May 28, 1965

File: A-10767234—San Francisco

In re: Gerard Joseph Lavoie

In Deportation Proceedings

Appeal

On Behalf of Respondent: George R. Anderson, Esq.
240 Montgomery Street
San Francisco, California
(Brief filed)

On Behalf of I&N Service: Stephen M. Suffin
Trial Attorney
(Brief filed)

Charges:

Order: Section 241(a)(1), I&N Act (8 USC 1251
(a)(1))—Excludable at time
of entry—afflicted with
psychopathic personality

Lodged: None

Application: Termination of the proceedings

The case comes forward on appeal from the order of the special inquiry officer dated March 11, 1965 again ordering that the respondent be deported from the United States to Canada on the charge set forth in the Order to Show Cause.

The case was previously before us on appeal from the order of the special inquiry officer dated January 30, 1964 ordering respondent deported on the charge set forth in the Order to Show Cause. The record relates to a native and citizen of Canada, 41 years old, male, single, who entered the United States for permanent residence at Noyes, Minnesota, on January 26, 1960. He last entered the United States at Noyes, Minnesota on or about May 5, 1960 as a returning resident. The Order to Show Cause charges that the respondent was a sexual deviate at the time of his entries and is subject to deportation under Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens afflicted with psychopathic personality, under Section 212(a)(4) of the Act.

At prior hearings there was introduced into the record a statement taken from the respondent dated August 30, 1961 to the effect that he was homosexual according to his interpretation of the term "homosexual" which meant to him a person whose sexual perversions are directed to members of his own sex; that he had had his first homosexual experience at the end of 1946 in Winnipeg, Manitoba, Canada; during 1946, 1947 and 1948 he had more than a dozen experiences; after 1948 until 1959 these experiences occurred once or twice a month; in the last two years prior to the making of the statement he had five or six such experiences. Doctor Beittel, a staff psychiatrist of the

United States Public Health Service stated that the respondent had been a sexual deviate at least since 1946 and certified that the respondent was a sexual deviate in January of 1960 at least up to the time of his arrest, based upon an interview of approximately 60 minutes, although he concluded that from a psychiatric point of view, the alien could more accurately be described as a sexual deviate manifested by auto-eroticism and homo-eroticism. This witness stated that he was compelled by the directives of the United States Public Health Service Manual to classify the respondent on the basis of his diagnosis of sexual deviate and history of homosexuality as a psychopathic personality.

At prior hearings the respondent produced as a witness in his behalf Doctor Diamond, a specialist in psychiatry, who testified that he had spent eight hours over a period of eight weeks in examining and treating the respondent. His testimony is to the effect that the respondent was not afflicted with psychopathic personality or a character disorder but was suffering from a neurotic conflict over sex, whose symptoms were manifested by his homosexuality. He rejected the description of psychopathic personality as obsolete from a psychiatric viewpoint. He also testified that homosexuality is not an appropriate medical term, that there was no such diagnosis as homosexuality, and that from a psychiatric standpoint the respondent was not a homosexual. This doctor conceded that the respondent's sexual behavior was abnormal and a deviation from acceptable normal standards.

In our previous order of May 6, 1964 we quoted from Senate Report No. 1137 (82nd Congress, 2d Session, January 29, 1952) indicating that the Public Health Service had advised that the provisions for the exclusion of aliens afflicted with psychopathic personality or a mental defect is sufficiently broad to provide for the exclusion of homosexuals and sex perverts and that the change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates. Whatever the phrase "psychopathic personality" might mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts.¹

We remanded the case in order to have included in the record the pertinent section of the United States Public Health Service Manual for the Medical Examination of Aliens and for characterization of the respondent's disorder by both psychiatrists in the light thereof, to take further testimony as to what pattern determines a sexual deviate or homosexual and to evaluate the evidence to determine whether a preponderance of the evidence establishes the charge.

At the reopened hearing held on October 1, 1964 only Doctor Beittel appeared as a witness. He reaffirmed his position that within the meaning of the pertinent section of the Manual for Medical Examina-

¹*Matter of P*—, 7 I&N Dec. 258; *Matter of S*—, 8 I&N Dec. 409; *Matter of R*—, 9 I&N Dec. 393; *United States v. Flores-Rodriguez*, 237 F. 2d 405 (2d Cir., 1956); *Harb-Quiroz v. Neely*, 291 F. 2d 906 (5th Cir., 1961).

tion of Aliens the respondent was afflicted with psychopathic personality.²

The testimony of the psychiatric witnesses has served only to compound the confusion inasmuch as both appear to agree that the phrase "psychopathic personality" has no precise medical meaning and that "homosexual" is not a medical term. This difficulty however is recognized both in the legislative history previously referred to and in the Manual for Medical Examination of Aliens itself. As emphasized in the legislative history, the term "psychopathic personality" was understood to be broad enough to provide for the exclusion of homosexuals and sex perverts and was not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates. We are not concerned with the niceties of semantic differences indulged in by psychiatrists. The words, "psychopathic personality" have become words of

²The Manual for Medical Examination of Aliens (1963) 6-5, which deals with psychopathic personality reads as follows:

- (a) The legal term "psychopathic personality" is equivalent to the medical designation "personality disorder," which may be broadly defined as follows: "These disorders are characterized by developmental defects or pathological trends in the personality structure, with minimal subjective anxiety and little or no distress. In most instances, the disorder is manifested by a lifelong pattern of action or behavior (acting out), rather than mental or emotional symptoms." An example of such a certificate is Class A, Psychopathic personality, Inadequate personality.
- (b) Under this legal category will be classified those applicants who are diagnosed as sexual deviates. In the medical examination of aliens this is a difficult diagnosis to establish. However, the examiner should assist the consular officer when possible when evaluating an applicant thought to come in this category.

art which, whatever else they might mean, include homosexuality and sex perverts and the term is applied as it is commonly understood.³ We conclude that the government has borne the burden of establishing that the respondent is deportable on the charge stated in the Order to Show Cause.

The main thrust of counsel's argument is that the statute upon which the proceeding is based is unconstitutional and unconstitutionally applied as determined by the court in *Fleuti v. Rosenberg*, 302 F. 2d 652 (9th Cir., 1962). However, on appeal, the constitutional question was bypassed, the decision below vacated and the case was decided on other grounds by the Supreme Court.⁴ The constitutional question therefore remains unresolved and this is not the proper forum in which to try that question. The appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thomas J. Griffin
Acting Chairman

³*Harb-Quiroz v. Neely*, 291 F. 2d 906 (5th Cir., 1961); *Matter of S—*, 8 I&N Dec. 409.

⁴*Rosenberg v. Fleuti*, 374 U.S. 449, 10 L.ed. 2d 1000 (1963).

Appendix III

Report of the Public Health Service on the medical aspects of H.R. 2379, a bill to revise the laws relating to immigration, naturalization, and nationality, and for other purposes (H. Rep. 1365, 82d Cong., 2d sess., pp. 46-48) :

It is recommended that the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

1. Aliens who are idiots, imbeciles, or morons.
2. Aliens who are insane.
3. Aliens who have had one or more attacks of insanity.
4. Aliens afflicted with psychopathic personality, epilepsy, or a mental defect.
5. Aliens who are narcotic drug addicts or chronic alcoholics.
6. Aliens who are afflicted with tuberculosis in any form, or with leprosy or any other dangerous contagious disease.
7. Aliens certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living.

The following comments are submitted:

* * * * *

Psychopathic personality. — Some comments should be expressed regarding the term "psychopathic personality." Although the term "pys-

chopathic personality," used in classifying certain types of mental disorders, is vague and indefinite, no more appropriate expression can be suggested at this time. The conditions classified within the group of psychopathic personalities are, in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or emotional symptoms. Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends, or are persons ill primarily in terms of society and the prevailing culture. The latter or sociopathic reactions are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation. Until a more definitive expression can be devised, the term "psychopathic personality" should be retained.

Epilepsy.— * * *

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Sexual perverts.—The language of the bill lists sexual perverts or homosexual persons as among those aliens to be excluded from admission to the United States. In some instances considerable difficulty may be encountered in substantiating a diagnosis of homosexuality or sexual perversion. In other instances where the action and behavior of the person is more obvious, as might be noted in the manner of dress (so-called transvestism or fetishism), the condition may be more easily substantiated. Ordinarily, a history of homosexuality must be obtained from the individual, which he

may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis. The detection of persons with more obvious sexual perversion is relatively simple. Considerably more difficulty may be encountered in uncovering the homosexual person. Ordinarily, persons suffering from disturbances in sexuality are included within the classification of "psychopathic personality with pathologic sexuality." This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc. In those instances where the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect.

Mental defect.—The utilization of the term "mental defect" serves a very useful purpose and should be continued within the language of the bill. It should be pointed out that in using this expression, "mental defect," it has or bears no relationship to mental deficiency which is related to the intellectual status of the individual. The term "mental defect," although broad and sweeping, is a safeguard for classifying those aliens who would not fit into the categories listed above. For example, there is a fairly large group of hereditary disturbances which at the time of examination could not be included in the above classification. This expression could also be

utilized in classifying progressive personality disorders which occur in such conditions as infections of the nervous system; for example, in behavior disorders of epidemic encephalitis. Such a term could also be used to cover the more severely disabling neuroses and conduct and habit disorders of adults and children. It can be used in classifying those persons who are likely to be brought into repeated conflict with social customs, authority, or society in general. It is, therefore, recommended that the expression "as having a mental defect" be retained within the language of the bill.

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